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95-1597

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JAMES EDWARD SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Fourth Circuit's affirmance of the district court's denial of Petitioner's 28 U.S.C. § 2255 motion conflicts with rulings of this Court, the Fourth Circuit, and all other circuit courts, because the trial court did not hold an evidnetiary hearing on the motion even though it alleged facts outside the record which were supported by affidavits, and the facts, if true, would have entitled Petitioner to relief.

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OPINIONS BELOW

The opinions and orders at issue in this Petition for certiorari are listed below. Copies of each document are being submitted in the Appendix accompanying this Petition.

1. Final Order and Memorandum Opinion Filed On December 7, 1994.

> This Order, issued by the Honorable Richard L. Williams, Senior United States District Court Judge for the Eastern District of Virginia, denied Petitioner's 28 U.S.C. § 2255 Motion without an evidentiary hearing.

See Appendix B.

2. *United States v. James Edward Smith,* slip op. 95-6148 (November 27, 1995, 4th Cir.).

> This was an unpublished per curiam opinion in Appeal No. 95-6148, issued on November 27, 1995, by a panel of the 4th Circuit, which affirmed the District Court's denial of Petitioner's 28 U.S.C. § 2255 Motion.

See Appendix A.

STATEMENT OF JURISDICTION

On November 27, 1995, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the Final Order of the United States District Court for the Eastern District of Virginia which was issued on December 7, 1994, and which denied Petitioner's 28 U.S.C. § 2255 Motion. This Petition for a Writ of Certiorari is timely filed.

STATUTORY PROVISION INVOLVED

§ 2255. Federal Custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or th the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement onstitutional rights of the prisoner as to render the judgment

vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant had failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legaility of his detention.

(As amended May 24, 1949, c. 139 § 114, 63 Stat. 105.)

STATEMENT OF THE CASE

In early 1990, a Grand Jury sitting in the Eastern District of Virginia indicted the Petitioner, along with two co-defendants. The multi-count indictment contained the following charges against Petitioner: one count of being a felon in possession of firearm, in violation of 18 U.S.C. § 922(g); one count of interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952(a)(3); one count of possession with the intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1); two counts of use of a communications facility in a drug transaction, in violation of 21 U.S.C. § 843(b); one count of distribution of heroin, in violation of 21 U.S.C. § 841(a)(1); and one count of conspiracy with the intent to distribute heroin, in violation of 21 U.S.C. § 846 and § 841(a)(1).[1]

Petitioner's jury trial commensed on March 12, 1991, with the Honorable Richard L. Williams presiding. After a three-day trial, the jury returned guilty verdicts on all counts except one of the of two communication counts.

Petitioner was sentenced by Judge Williams on May 16, 1991. He received terms of 120 months on the firearm count, 60 months on the racketeering count, 84 months on the use of a communications device count, and 120 months on the distribution count, each running consecutively. He also received a term of 400 months on the possession of heroin count, which was made to run concurrently with the other consecutive sentences. Petitioner also was sentenced to a 10 year period of supervised release and a fine of $525,000. Petitioner filed a timely notice of appeal. A panel of the Fourth Circuit denied Petitioner's direct appeal on June 10, 1992. Subsequently, a petition for writ of certiorari to review this affirmance of his conviction was also denied.

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1. The conspiracy count was dismissed at trial. One of the two communications counts was dismissed before trial.

In 1994, Petitioner filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255. His motion, supported by affidavits, raised two issues requiring an evidentiary hearing:

1. Whether Petitioner was entitled to a new trial because his counsel was ineffective in failing to properly investigate his case;

2. Whether Petitioner should be resentenced because his counsel failed to review the presentence report with Petitioner and, thus, failed to identify and challenge material errors contained in the report.[2]

Despite Petitioner's request for an evidentiary hearing on all factual issues raised in these claims, the district court denied Petitioner's motion without a hearing on December 7, 1994. *See* Appendix B. A panel of the Fourth Circuit affirmed the district court's denial of Petitioner's motion in a per curiam opinion on November 27, 1995. *See* Appendix A.

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2. Petitioner's § 2255 motion also addressed the following two issues which are not being raised, herein, as Petitioner's grounds for requesting an evidentiary hearing:

(a) Whether Petitioner should be resentenced because his original sentence was based on material falsehoods in violation of his right to due process;

(b) Whether Petitioner should be resentenced because he was improperly sentenced to terms of consecutive imprisonment in violation of 18 U.S.C. § 3584(a).

A. Petitioner's Trial.

In its barest terms, the government's case at trial was based on the highly incredible testimony of an individual known to have made his fortune from drug-dealing, number-running and loansharking. Following his arrest for the possession of a large amount of heroin, he managed to obtain a favorable plea bargain by telling government authorities that Petitioner was the true owner of the heroin. As a consequence, Petitioner is now serving 400 months (over 33 years) in prison for possessing and distributing heroin that was seized from the government's star witness. Furthermore, at the time of the seizure, Petitioner was already incarcerated and cooperating with law enforcement officials in another jurisdiction.

By all accounts, the government began its investigation of Petitioner, regarding the charges described above, when James Reginald Smith, a.k.a, "Scank" (henceforth, called "Scank"), was arrested by law enforcement officials on October 20, 1989. The officials had been following Scank for some time and were aware that he was in possession of 3 kilograms of heroin which he was keeping in a storage bin. This represented the largest amount of heroin ever seized in the State of Virginia at the time of his arrest. (Tr. 186, 271-272).[3] Upon his arrest, police officers also seized $377,000 from Scank's home (Tr. 250).

Scank was a self-admitted drug dealer over the previous 16 or 17 years and he had at least two felony convictions. (Tr. 109, 184). His also admitted that he built his fortune through loan sharking and the numbers racket. (Tr. 311). Following his arrest, Skank held extensive discussions with his counsel about the

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3. "Tr. __" refers to the 1465-page transcript of Petitioner's trial, which commenced on March 12, 1991, the Honorable Richard L. Williams presiding.

severity of the charges that being lodged against him just prior to informing the government that the heroin really belonged to Petitioner.[4]

Based on a promise to cooperate, Scank was permitted to enter into a plea bargain on January 1, 1990. At Petitioner's trial, Scank testified that he visited Petitioner several times in 1988 at the Alexandria, Virginia Detention Center, after Petitioner had been arrested for narcotics distribution in the Washington, D.C. area. (Tr. 118). Scank alleged that, during one of these visits, Petitioner asked him to pick up "some stuff" at Petitioner's three apartments located in Washington, D.C. Scank said he thought Petitioner had asked him to pick up $3 million in money, rather than a quantity of drugs. (Tr. 119). On the other hand, Scank also testified that he organized a group of people in Richmond, Virginia, and took them to Washington, D.C., in two U-Hauls. (Tr. 121-122). According to Scank, after they reached Washington, D.C., they found "two or three kilos" of heroin in one of Petitioner's apartments. (Tr. 127).

Scank testified that the group took the "two or three kilos" back to Richmond, Virginia, and moved it several times from one location to another. (Tr. 154). Scank also alleged that, during a subsequent visit to see Petitioner, Petitioner told Scank to sell the heroin and use the funds to pay some of Petitioner's bills, which included $1,250,000 that Petitioner owed one of his suppliers. (Tr. 155). Scank claimed that he sold some of the heroin, but eventually found he could not sell it because it was inferior in quality. (Tr. 162-163). Scank alleged that, upon informing Petitioner that the drug was not selling well, Petitioner said he would get more. (Tr. 164).

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4. At trial, Scank would similarly claim that the $377,000 was not his, but belonged to his recently deceased brother.

In addition to negotiating a plea bargain with Scank, the government also worked out a plea agreement with Charles Henry Smith, who alleged that he sold drugs for Petitioner through the 1970's and 1980's. Charles also alleged that he knew Scank was planning to pick up two or three kilos of heroin for Petitioner in Washington, D.C., after Petitioner was arrested. (Tr. 376-380).

Charles Smith's credibility regarding these claims was later impeached, however, after he claimed on direct examination that he went to Washington, D.C. with Scank in order to give an attorney, named "Allen Palmer," $5,000 to pay off a judge on behalf of Petitioner. (Tr. 380-382, 421-422). Allen Palmer subsequently took the stand and thoroughly refuted this allegation. (Tr. 515-517).

The government's third witness, Excell Alexander, agreed to testify against Petitioner only after the government granted him immunity. (Tr. 533). When he was first called before a grand jury, he claimed that he only knew Petitioner in a social capacity and was unaware that Petitioner sold drugs. (Tr. 592). Although Alexander steadfastly maintained this position for nearly nine months, he quickly changed it once he was offered immunity. (Tr. 592-594).

At Petitioner's trial, Alexander told the jury that he was a heroin addict, who in 1979-1980, delivered heroin to Scank at the direction of Petitioner. (Tr. 536). Alexander said he was contacted by Petitioner's daughter, Olivia Bratton, after Petitioner was arrested, and asked to pass information about apartment addresses to Scank. (Tr. 542).

According to Alexander, a few days after he met Ms. Bratton, he met Scank and some other men and they all went to an apartment on Fourth Street, S.E., in Washington, D.C., where

they removed three or four suitcases and a television set (Tr. 553-54). Later, he accompanied the same men to two other apartments. Despite acknowledging that he saw suitcases removed from the apartments (Tr. 558), when Alexander was pushed to be specific about the items seen at this time, he thoroughly contradicted Scank's account, claiming that he never saw guns (Tr. 557), $75,000 in currency (Tr. 548), or two to three kilos of heroin taken from any of the apartments as Scank had claimed (Tr. 569-570).

B. Petitioner's § 2255 Motion.

The Petitioner's § 2255 motion alleged two central issues which required an evidentiary hearing prior to the court's ruling on them: (1) whether trial counsel was ineffective for failing to interview potentially exculpatory witnesses after another attorney hired by Petitioner informed trial counsel prior to trial both that such witnessess were available and what their possible testimony would be; and (2) whether counsel was ineffective immediately before and during sentencing because he failed to review the presentence report with Petitioner and, thus, failed to identify and challenge errors material to Petitioner's sentence.

Angered by trial counsel's refusal to investigate his case, Petitioner hired a second counsel, Bernard S. Grimm, whose assignment was to conduct a pretrial investigation for Petitioner. During this investigation, in which Mr. Grimm's investigator, David A. Georger, provided assistance, Mr. Grimm discovered several witnesses who were aware of evidence that was exculpatory.[5] Mr. Grimm then reported to Petitioner's trial

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5. *See* Appendix H (Affidavit of Bernard S. Grimm), Appendix I (Affidavit of David A. Georger), and Appendix F (Affidavit of James Smith). A witness, Bernard Jones, would have testified that the apartment which was alleged to be that of Petitioner and the place where Scank picked up drugs, was really his (*i.e.*, Jones') apartment.

counsel, Mr. Gettings, prior to trial, that he had found witnesses who were willing to testify that Petitioner had not participated in the criminal activities alleged by the government.[6] Despite receiving this information, trial counsel made no effort to interview the identified witnesses or have them available to testify at trial.

Undaunted by Mr. Gettings' laxity, Mr. Grimm, at Petitioner's request, made several of the witnesses available to testify on the day that the trial commenced. Following an argument with Petitioner about Petitioner's refusal to accept a plea bargain,[7] trial counsel told the witnesses whom Mr. Grimm had gathered to go home. Thus, without ever learning whether the witnesses could provide expulpatory evidence as Petitioner claimed, trial counsel chose not to put on the defense which Petitioner desired.

Subsequently, in his § 2255 motion, Petitioner submitted affidavits from several of the witnesses whom trial counsel chose to ignore.[8] The affidavits summarized the exculpatory evidence to which the witnesses would have attested. In all, Petitioner presented the court with affidavits from Attorney Grimm, Mr. Grimm's investigator, LaFonda Shelton, Letitia Mayo, Olivia Bratton, Darnell Jackson, and Petitioner, himself,

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6. *See also* Appendix E (Affidavit of LaFonda Shelton) in which Petitioner's daughter Lafonda Shelton also attests that the apartments allegedly rented by Petitioner were the private dwellings of others and not Petitioner.

7. *See* Appendix G (Affidavit of Olivia Bratton), in which Olivia Bratton maintains that she "overheard [Petitioner] and Mr. Gettings having a heated discussion[ ] right before the trial started . . . because [Petitioner] refused to enter into a plea bargain."

8. *See* Appendices A through I.

as to the circumstances surrounding counsel's conduct and the testimony that could have been adduced.

In its opposition, the Government attempted to counter Petitioner's claim merely by submitting an affidavit from defense counsel Gettings. Mr. Gettings stated that he had determined that it would not be fruitful to interview the witnesses that Petitioner named. Also, he claimed that he interviewed the witnesses whom Mr. Grimm brought to Petitioner's trial, but, he did not find their testimony useful for Petitioner's defense. Relying solely on this affidavit, the district court denied Petitioner's claim. According to the court, the affidavit justified its finding that counsel's decision not to interview Petitioner's exculpatory witnesses was a strategic choice and that counsel adequately investigated Petitioner's case. (*See* Appendix B — Order of December 7, 1994, at p.3).

Petitioner's second contention focused on inaccurate information in his presentence report. Petitioner alleged that he did not review the presentence report ten days before sentencing, and he never reviewed the report with his counsel. In fact, the only time Petitioner got a chance to see the report was the night before sentencing, in the presence of defense counsel's assistant. The assistant stayed approximately fifteen minutes, not enough time for Petitioner to read the full report. In addition, the assistant would not answer any of Petitioner's questions about the report.

At sentencing, counsel did not object to the presentence report and his allocution on behalf of Petitioner was limited to a plea for leniency. It was not until after sentencing that Petitioner had an opportunity to read the presentence report and discover that it contained erroneous information. The district court found, however, that defense counsel had no duty to review the presentence report, prior to sentencing, with Petitioner.

Furthermore, the court claimed that trial counsel's efforts at arguing for leniency were sufficient to satisfy his obligation to Petitioner. (*See* Appendix B — Order of December 7, 1994, at p.4).

Petitioner filed a timely notice of appeal and was subsequently directed to file an "informal brief." On November 27, 1995, a panel of the Fourth Circuit affirmed the district court's denial of Petitioner's motion in a per curiam opinion.

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH CIRCUIT'S AFFIRMANCE OF THE DENIAL OF PETITIONER'S § 2255 MOTION CONFLICTS WITH RULINGS OF THIS COURT, THE FOURTH CIRCUIT, AND ALL OTHER CIRCUIT COURTS BECAUSE THE TRIAL COURT DID NOT HOLD AN EVIDENTIARY HEARING ON THE MOTION, EVEN THOUGH IT ALLEGED FACTS OUTSIDE THE RECORD WHICH WERE SUPPORTED BY AFFIDAVITS, AND THE FACTS, IF TRUE, WOULD HAVE ENTITLED PETITIONER TO RELIEF.

It is well established that, when relief is sought pursuant to 28 U.S.C. § 2255, the motion should be given an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . ." 28 U.S.C. § 2255; *see Sanders v. United States*, 373 U.S. 1, 19-22 (1963) (citing *Machibroda v. United States*, 368 U.S. 487, 494 (1962)); *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *see also*, Rule 4(b) of the Rules Governing Section 2255 Proceedings (a petition should not be dismissed without a hearing unless it "plainly appears from the facts of the motion and any annexed

exhibits and the prior proceedings in the case that the movant is not entitled to relief").[9]

Where collateral claims involve facts outside the record, as in this case, the trial court has a duty to carefully examine the allegations to determine whether they would warrant relief if they were true. *See Machibroda v. United States*, *supra*, 368 U.S. 487, 495-496. This is particularly true when ineffective assistance claims are at issue, because trial counsel's ineffectiveness may often depend on what counsel did or did not do prior to trial. *See Strickland v. Washington*, 466 U.S. 668 (1984).[10]

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9. The standard of review for denials of § 2255 evidentiary hearings is abuse of discretion. *See United States v. Estrada*, 849 F.2d 1304, 1305 (10th Cir. 1988)(court performs two-step analysis under § 2255: 1) whether defendant would be entitled to relief if charges proved, and 2) whether district abused discretion in denying evidentiary hearing).

10. The importance of the trial court's conducting an evidentiary hearing for claims of ineffective assistance of counsel in § 2255 petitions has been well recognized by the circuit courts. *See, e.g., United States v. Magini*, 973 F.2d 261 (4th Cir. 1992) (denial of § 2255 motion without an evidentiary hearing remanded with instructions that a hearing be held on claim that counsel coerced defendant to plead guilty to protect his own private, pecuniary interest); *Becton v. Barnett*, 920 F.2d 1190, 1192 (4th Cir. 1990) (denial of a § 2254 petition without a hearing remanded for hearing on two claims of ineffective assistance of counsel); *United States v. Rodriguez*, 929 F.2d 747 (1st Cir. 1991) (evidentiary hearing required on allegation that counsel, due to conflict of interest, failed to inform petitioner of plea offer); *United States v. Dawson*, 857 F.2d 923 (3d Cir. 1988) (evidentiary hearing required for ineffective assistance of counsel claim when claim nonfrivolous and colorable in light of existing record); *Neary v. United States*, 998 F.2d 563 (8th Cir. 1993) (hearing required on claim of ineffective assistance of counsel when record appeared insufficient for obstruction of justice enhancement and counsel failed to raise issue on appeal); *Daniels v. United States*, 54 F.3d 290 (7th Cir. 1995) (petitioner entitled to evidentiary hearing on claim that counsel, due to

(Cont'd)

A. If Petitioner's Allegations Are Found To Be True, Then Petitioner's Counsel Provided Ineffective Assistance Of Counsel And Relief Must Be Granted.

In *Strickland v. Washington*, *supra*, this Court held that ineffective assistance of counsel can provide grounds for reversal only if the following conditions are established:

1. Counsel's performance fell below an objective standard of reasonableness;

2. There is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different.

Strickland v. Washington, *supra*, 466 U.S. at 688, 694. At issue in *Strickland* was whether defense counsel had failed to conduct an objectively reasonable investigation pretrial. On this point, this Court stated that counsel's duty is "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Moreover, "counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* This Court thus concluded that the reasonablness of a decision to investigate will depend critically on the defendant's information. *Id.*

(Cont'd)
fee dispute with petitioner, coerced him to accept plea bargain); *United States v. Yizar*, 956 F.2d 230 (11th Cir. 1992) (evidentiary hearing required on claim that counsel failed to investigate witnesses or to discover that co-defendant would provide exculpatory testimony for petitioner); *United States v. Burrows*, 872 F.2d 915 (9th Cir. 1989) (evidentiary hearing required on allegation of ineffective assistance due to counsel's failure to investigate movant's mental state).

These points were reiterated in *Kimmelman v. Morrison*, 477 U.S. 365 (1986), where this Court ruled that counsel was ineffective in a case where counsel did not conduct any pretrial discovery. This Court found that counsel had no strategic reason not to request discovery. Rather, counsel did not seek discovery because he mistakenly believed the State had a duty to inform him before trial of its inculpatory evidence. Because no strategic reason supported counsel's decision to forego discovery, this Court ruled the counsel was ineffective pretrial.

The Fourth Circuit has also recognized that counsel's failure to investigate his client's desired defense amounts to ineffective assistance. In *Washington v. Murray*, 4 F.3d 1285, 1288 (4th Cir. 1993), the appellate court held that counsel was ineffective for failing to investigate a defense based upon forensic evidence despite counsel's testimony, in an evidentiary hearing, that he would not have introduced the evidence had it been available.[11] Similarly, in *Hooper v. Garrgaghty*, 845 F.2d 471 (4th Cir. 1988), where the defendant's only possible defense was insanity, counsel failed to have the defendant psychiatrically evaluated merely because he believed the chances of the defense succeeding were slim. The Fourth Circuit held that not having the client evaluated was ineffective assistance, given that no other viable defense was available. The court also noted that whether the exam would have supported an insanity defense was not the significant question. Rather, even assuming unhelpful

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11. According to the Fourth Circuit, trial counsel was ineffective because "he consulted with no experts about the report, and never realized that Washington's blood type was inconsistent with the seminal fluid on the blanket until Washington's habeas counsel told him well after the trial. Prior to trial, counsel was completely in the dark about the import of the evidence, and therefore, could not have made a strategic choice against using it." *Id.* at 1288.

results, "knowing the results of . . . whatever they may have been, would have assisted Hooper in making his choice." *Id.*[12]

In light of the importance assigned to pretrial investigation, it should be clear that Petitioner's allegations — if established — make out a persuasive case for finding his counsel ineffective. Indeed, as Petitioner's affidavit alleges, trial counsel refused to investigate the defense Petitioner wished to pursue. Petitioner further alleges that, in desperation, he hired another attorney to conduct the investigation his defense required.

It is particularly significant that Petitioner's assertions about his counsel's failure to investigate are corroborated by both the affidavit from, Bernard Grimm, the attorney Petitioner hired to investigate his case when his trial counsel refused to do so, and the affidavit of Mr. Grimm's investigator, who pursued a number of Petitioner's leads. Thus, *before* Petitioner's trial, there already was a rupture in the attorney-client relationship due to the refusal of Petitioner's trial counsel to investigate and prepare the defense which Petitioner desired.

The affidavit of Olivia Bratton suggests the reason why Petitioner's counsel refused to take Petitioner's defense

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12. Other circuit courts have similarly found counsel's failure to conduct an adequate pretrial investigation to warrant ruling that counsel provided ineffective assistance. In *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994), the court held that, although counsel's decision to not produce witnesses *after* interviewing them is "virtually unchallengeable," as a matter of strategy, the failure to investigate will be deemed ineffective assistance unless the "defendant has given reason to believe that pursuing certain investigations would be fruitless or even harmful". *Id.* at 1415. Similarly, in *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994), the court ruled that "strategic" choices made absent an investigation were subject to review and the failure to investigate would be grounds for finding counsel ineffective absent a "reasoned and deliberate determination that investigation was not warranted."

seriously and undertake the investigation required. Ms. Bratton recounts that Petitioner and trial counsel exchange angry words on the morning of the trial over the question whether Petitioner should simply accept a plea bargain. This further substantiates Petitioner's allegations of ineffective assistance, given that counsel's goal seems never to have amounted to more than to negotiate a plea bargain. Thus, in light of the subtantial corroboration of Petitioner's allegations and the fact that no evidence in the record *conclusively* shows that Petitioner is not entitled to relief, it should be clear that Petitioner's claim of ineffective assistance of counsel warranted an evidentiary hearing.

Petitioner's decision to retain another counsel to conduct a pretrial investigation manifested his distrust of trial counsel. Furthermore, the fact that the decision bore fruit which trial counsel refused to examine shows just how far trial counsel's performance fell below the objective standard of reasonableness. A key element in the government's case was that in an apartment *owned* by Petitioner, its key witness James "Scank" Smith found drugs and guns. Attorney Grimm, however, located a witness, Bernard Jones, who would have testified that the apartment in question belonged to him. Trial counsel, however, not only did not produce Jones as a witness, he failed even to interview him.

Jones was not the only potential witness defense counsel failed to interview, let alone call. A central part of the government's case was that Petitioner, while incarcerated, directed "Scank" to give money to his daughter, Rose Mayo, for drugs. Rose Mayo, however, was prepared to refute that allegation. She was at the courthouse, prepared to testify, but trial counsel refused to interview her, let alone call her as a witness.

Defense counsel's performance at trial, we submit, fully corroborates the assertions Petitioner made in his post-conviction motion. Throughout the trial, the trial court expressed his impatience with defense counsel's inability to keep focused and admonished him to "start doing a little thinking" as he cross-examined witnesses. (Tr. 259). During the defense case, after a potential witness was almost excluded because of a violation of the rule on witnesses, defense counsel had to admit that he did not "recognize" the defense witnesses because he had never "seen these people." (Tr. 1100). Later, during his closing argument, counsel became confused as to the facts, and had to have his co-counsel help straighten him out. (Tr. 1290). The gaffe was so noticeable that the prosecutor seized upon it in his rebuttal argument, referring to how counsel "screwed-up" the evidence. (Tr. 1371). All of these in-trial occurrences corroborate Petitioner's central point that his attorney was unprepared.

In summary, we are *not* saying that Petitioner should have won his motion on the papers alone. The strength of the defense Petitioner wished to assert and the statements of his potential witnesses, needs to be tested on the anvil of cross-examination. Similarly, defense counsel's unsupported assertion in his affidavit that he chose not to interview or call the witnesses in question as a matter of strategy must also be tested in an adversarial process. Petitioner's allegations, when read in connection with the entire record, supply ample facts outside the record to warrant an evidentiary hearing. The lower court erred in not conducting one.

B. Trial Counsel Should Have Reviewed The Presentence Report With Petitioner Prior To Sentencing, And, As A Consequence, Identified And Objected To Materially False Claims In The Report.

As noted at the outset, Petitioner's motion also alleged that counsel also provided ineffective assistance immediately before

and during sentencing. *See United States v. Johnson*, 935 F.2d 47, 49 (4th Cir. 1991)(holding that defendant has constitutional right to effective representation at sentencing). That is, Petitioner alleged that his trial attorney never reviewed the presentence report with him and, as a consequence, failed to identify and object to false information contained in the report that affected his sentence. Notwithstanding the gravity of these allegations, the trial court denied his motion without a hearing.

The ABA Standards Relating to the Administration of Criminal Justice, states:

> [d]efense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary.

Standard 4-8.1 (1979). In the case of *United States v. Kovic*, 830 F.2d 680 (7th Cir. 1987), the court found "it is incumbent upon counsel to examine and review the [presentence] report with their clients and notify the court at the sentencing hearing of the defendant's changed circumstances, if any." *Id.* at 686. Also, in *United States v. Rone*, 743 F.2d 1169 (7th Cir. 1984), the Seventh Circuit noted :

> We note that if the defense counsel was given an adequate opportunity to review the report but did not contest the report's apparent inaccuracies, his performance might appear to fall below the minimum standards of professional competence.

Id. at 1173. *See also*, *United States v. Bartholomew*, 974 F.2d 39, 42 (5th Cir. 1992).

In the instant case, the district court's ruling essentially assumes that counsel did not review the presentence report with Petitioner before sentencing. Defense counsel's affidavit did not contradict this claim. Contrary to the authority set forth, *supra*, the district court found that counsel was not ineffective at sentencing because Rule 32 did not require counsel to review the presentence report with Petitioner before sentencing. Rule 32(c), by its terms, commands that "the court shall provide defendant and defendant's counsel with a copy" of the presentence report ten days before imposing sentence. We submit that the district court has read Rule 32 far too narrowly. In this day and age, where sentencing has become enormously complicated by virtue of the Sentencing Guidelines and various mandatory minimum provisions, it is imperative that defense counsel do more, not less, than ever before prior to sentencing. The *Kovic* and *Bartholomew*, decisions, holding that defense counsel has an obligation to review the presentence report prior to sentencing are far closer to the mark of reasonableness than the lower court's decision.

Obviously, this information was utilized by the Court in making sentencing determinations with regard to the Petitioner. Moreover, this Court has noted that a defendant is prejudiced anytime that erroneous information remains in a presentence report that might later be used by the Bureau of Prisons. *See*, *United States v. Walker* 29 F.3d 908,911 (4th Cir. 1994). Indeed, to be effective at sentencing, counsel must do more than offer a lame argument for leniency. Counsel not only has an obligation to carefully review the presentence report; he must be prepared to identify inaccuracies and object to these when they are prejudicial. In *United States v. Ford*, 918 F.2d 1343 (8th Cir. 1990), for instance, the court found that counsel's failure to

argue for acceptance of responsibility where the commentary provided the defendant a basis for the reduction, denied the defendant a fair sentencing. *Id.* at 1350. In *United States v. Headley*, 923 F.2d 1079 (3d. Cir. 1991), the court found a Sixth Amendment violation where counsel failed to argue for a reduction for a minor role in the offense, given the court's willingness to consider such an adjustment. *Id.* at 1084.

Similarly, in *Gardiner v. United States*, 679 F. Supp 1143 (D. Me. 1988), the district court reversed a sentence on a 2255 motion where it was proven that counsel did not present any defense at sentencing. The court found that "[c]ounsel did not make a powerful, or even a weak, statement on the other side of the issue, and he did not act in the role of an advocate for the defendant." *Id.* at 1146. The court concluded that while there are several things counsel can omit at sentencing, "[h]e may not, however, choose to do nothing at all, for to do so is a total abdication of the role of counsel." *Id.*

In the present case, counsel's conduct clearly approached "total abdication." As we have noted earlier, there were several erroneous statements contained in the presentence report. Counsel made no attempt to correct them. As Petitioner asserted in his § 2255 motion, he has compelling arguments that (1) he should have not have received an aggravating role in the offense; (2) he was unaware of distributions of heroin; and (3) he was unaware of weapons involved in the offense. Counsel's failure to challenge these and other issues necessitate a resentencing.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court grant certiorari and vacate the ruling of the Fourth Circuit and remand this case with orders for the district court to conduct an evidentiary hearing on the issues described herein.

Respectfully submitted,

MARK J. ROCHON
Counsel of Record
ROCHON & ROBERTS
Attorneys for Petitioner
504 Seventh Street, S.E.
Washington, DC 20003
(202) 546-1500

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED NOVEMBER 27, 1995

UNPUBLISHE D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-6148

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

versus

JAMES EDWARD SMITH, a/k/a Dumptruck Smitty, a/k/a Smitty,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CR-90-71-R)

Submitted: November 16, 1995 Decided: November 27, 1995

Before MICHAEL and MOTZ, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Warren Gary Kohlman, KOHLMAN, ROCHON & ROBERTS, Washington, D.C., for Appellant. Sara E. Heath, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Appendix A

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant appeals from the district court's order denying his 23 U.S.C. § 2255 (1988) motion. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. *United States v. Smith*, No. CR-90-71-R (E.D. Va. Dec. 7, 1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION FILED DECEMBER 7, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Cr. No. 90-00071-R

UNITED STATES OF AMERICA

v.

JAMES EDWARD SMITH

FINAL ORDER

This matter is before the Court on petitioner's motion under 28 U.S.C. section 2255 for modification of sentence and for correction of the petitioner's Presentence Investigation Report. For the reasons set forth in the accompanying Memorandum Opinion, petitioner's motion is DENIED.

It is SO ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

DEC -7 1994

s/ Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

File No. 3:90CR71

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES EDWARD SMITH,

Petitioner.

MEMORANDUM OPINION

This matter is before the Court on petitioner's motion under 28 U.S.C. section 2255 for modification of sentence and for correction of the petitioner's Presentence Investigation Report. For the reasons set forth below, petitioner's motion is denied.

I. *Background*

On March 15, 1991, after a trial by jury, petitioner was convicted of possession of firearm by a convicted felon (count 2), interstate travel in aid of racketeering (3), possession of heroin with intent to distribute (4), use of a telephone in narcotics trafficking (7), and distribution of heroin (9). On May 16, 1991, petitioner was sentenced to 120 months' imprisonment on Count 2, 60 months on Count 3, 400 months on Count 4, 84 months on Count 7, and 120 months on Count 9. The terms of imprisonment on Counts 2, 3, 7, and 9 were to run consecutively to each other

and concurrently to the term on Count 4. The Fourth Circuit later affirmed petitioner's conviction.

II. *Analysis*

When considering a section 2255 motion, a court must hold an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. Petitioner's section 2255 motion makes the following assertions: that petitioner was denied effective assistance of counsel, both at trial and at sentencing; that he was denied Due Process because his sentence was predicated upon erroneous information; and that the Court created an invalid sentence by giving the petitioner consecutive sentences. Since all of these claims are without merit, this Court may deny petitioner's motion without holding an evidentiary hearing.

A. *Ineffective Assistance of Counsel Claim*

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Supreme Court set forth the standard for determining whether a lawyer has acted so egregiously as to deprive a criminal defendant of his Sixth Amendment right to counsel. Petitioner must establish two elements: first, that counsel's performance was deficient; and second, that the deficient performance prejudiced the defense. *Strickland,* 466 U.S. at 688. Clearly, this standard is difficult to satisfy. *See, e.g., Washington v. Murray,* 4 F.3d 1285, 1290 (4th Cir. 1993) ("[p]etitioner must show a reasonable probability, not just a remote possibility, that introduction of this evidence would have altered the result of his trial").

Appendix B

Petitioner raises two arguments to support his ineffective assistance of counsel claim. First, petitioner contends that trial counsel failed to properly investigate and put forth witnesses who were willing to testify in petitioner's favor. Petitioner thus asserts that counsel's failure to explore all avenues leading to facts relevant to the merits of the case constituted ineffective assistance of counsel. The Court finds, however, that petitioner has failed to satisfy either prong of the *Strickland* test. According to affidavits submitted by trial counsel, petitioner and his counsel discussed the potential witnesses and concluded that the witnesses either were unavailable or would not have helped the defense. Counsel's failure to interview and call these witnesses therefore constituted a tactical decision not amounting to deficient performance. *See Washington*, 4 F.3d at 1288; *see also Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977) (failure to call witness is a tactical decision not amounting to ineffective assistance). Moreover, petitioner has not shown that trial counsel's failure to interview and use the testimony of these witnesses prejudiced the outcome of his trial. Thus, petitioner's ineffective assistance of counsel claim is denied on these grounds.

Second, petitioner claims that trial counsel was ineffective at sentencing in failing to review the Presentence Investigation Report ("PSI") with him and object to erroneous information in the PSI at the sentencing hearing. Petitioner complains that he did not see the PSI until the night before the sentencing, when one of counsel's assistants reviewed it with him for 15 minutes. Petitioner further argues that trial counsel failed to fulfill his obligation to contest errors in the PSI. Petitioner faults the PSI for the following incorrect statements: that petitioner engaged in a drug conspiracy; that petitioner was involved in the distribution of over 1 kilogram of heroin; that petitioner

maintained his ties with the conspiracy while he was in prison; that petitioner was involved in weapons that were actually in storage; and that petitioner waived his indictment. Thus, petitioner concludes that counsel's deficient performance subjected petitioner to a higher sentence than was warranted.

Again, petitioner has failed to satisfy the *Strickland* criteria for an ineffective assistance of counsel claim. Petitioner is incorrect in contending that Federal Rule of Criminal Procedure 32(c) requires an attorney to review the PSI with his client 10 days before the sentencing. Rather, Rule 32(c) states that "the court shall provide the defendant and defendant's counsel with a copy" of the PSI 10 days before imposing sentence. Moreover, with respect to petitioner's claim that trial counsel failed to raise objections to the PSI, the record indicates that counsel did object to the PSI's recommendation of life imprisonment and argued successfully in favor of a lighter sentence. Finally, the Court notes that petitioner has not proffered any factual basis for the alleged errors in the PSI. Since petitioner has failed to demonstrate that counsel's performance at sentencing was deficient, and that counsel's deficient performance prejudiced his defense, his ineffective assistance claim based on this argument is denied.

B. *Due Process Claim Based on Erroneous Information in the Presentence Investigation Report*

Petitioner further claims that he was sentenced on the basis of erroneous information, in violation of his Due Process rights. Petitioner argues that the PSI erroneously concluded that he had an aggravating role in the offense, and that his sentence was therefore improperly enhanced. The petitioner further declares that the lengthy sentence imposed by the court demonstrated that

it considered the erroneous information in the PSI as aggravating factors.

To demonstrate that his sentence violated his Due Process rights, petitioner must "raise a grave doubt as to the veracity of the contested information and show that the court relied on the false information in determining the sentence." *United States v. Eshweiler,* 782 F.2d 1385, 1387 (7th Cir. 1986). As previously stated, petitioner has not established that the information in the PSI was in fact erroneous. Moreover, with respect to petitioner's claim he received a "longer than normal" sentence, the Court notes that the defendant was given the minimum mandatory sentence on all convictions except Count 7, where he faced a maximum penalty of 8 years' imprisonment but received only a 7 year sentence. Since petitioner has not raised a "grave doubt" as to the accuracy of the information in the PSI, petitioner has not shown that the imposed sentence violated his Due Process rights. Accordingly, the Court denies petitioner's section 2255 motion on these grounds.

C. *Due Process Claim Based on the Imposition of Consecutive Sentences*

Finally, petitioner contends that the Court created an invalid sentence by ordering all sentences but one to be served consecutively. Petitioner states that pursuant to U.S.S.G. section 5G1.2, consecutive sentences generally should be imposed only where the sentence imposed on the count carrying the highest statutory maximum is less than the minimum Guidelines sentence. U.S.S.G. § 5G1.2; *see also United States v. Martinez,* 950 F.2d 222 (5th Cir. 1991) (suggesting that "total punishment" denotes the minimum Guidelines sentence). The Court cannot comprehend how petitioner could be prejudiced by consecutive

sentences on Counts 2, 3, 7, and 9 when he was sentenced to a concurrent term of 400 months' imprisonment on Count 4. Accordingly, petitioner's section 2255 motion on these grounds is denied.

III. *Conclusion*

The Court finds that the grounds for petitioner's section 2255 motion are meritless. Accordingly, petitioner's motion is denied.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

DEC - 7 1994
DATE

s/ Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C — AFFIDAVIT OF DARNELL JACKSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Crim. No. 90-00071-R

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JAMES EDWARD SMITH,

Defendant.

AFFIDAVIT

I, Darnell Jackson, do hereby aver the following:

1. In 1988, I was incarcerated in Petersburg with the defendant James Smith. At no time did I ever discuss drug trafficking with him.

2. On or immediately before Mr. Smith's trial in March, 1991, I was brought to the courthouse by the prosecutor. I was pressured by the prosecutor about a conversation I had with Mr. Smith. Pressure was placed on me to give testimony to that effect concerning that conversation at Smith's trial.

3. In fact, the conversation had nothing whatsoever to do with drugs. It dealt with James Smith's efforts to lend money to my wife so that she could visit me while I was incarcerated.

Appendix C

4. The government decided not to call me as a witness because I refused to say the conversation involved drugs.

5. Mr. Smith's defense attorneys never spoke with me. Had they have asked, I would have testified for the defense.

s/ Darneli K. Jackson
DARNELL JACKSON

SUBSCRIBED AND SWORN TO before me on this 19th day of September, 1994.

s/ illegible
NOTARY PUBLIC

My Commission Expires: 3/31/96

APPENDIX D — AFFIDAVIT OF LETITIA MAYO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Crim. No. 90-00071-R

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JAMES EDWARD SMITH,

Defendant.

AFFIDAVIT

I, Letitia Mayo, 410 Bentwood Drive, Fort Washington, Maryland, 20744, do hereby aver the following:

1. I am a daughter of the defendant James Smith.

2. I was subpoenaed to his trial in March, 1991. I was at the courthouse for two days, but never called as a witness. I did not go in the courtroom where the trial was. No lawyer talked to me while I was in court. No lawyer talked to me before the trial.

3. I know one of the government witnesses, James Richard Smith, or "Skank." On May 1, I met with him so that he could cash a check for me. The meeting had been arranged by my father, James Smith. The meeting with James R. Smith "Skank" had nothing to do with narcotics. Narcotics were never discussed at the meeting.

Appendix D

4. At my father's trial, I willingly would have given this testimony.

s/ Letitia Mayo
LETITIA MAYO

SUBSCRIBED AND SWORN TO before me on this 19th day of Sept., 1994.

s/ Michael L. Phillips
NOTARY PUBLIC

My Commission Expires: MICHAEL L. PHILLIPS
NOTARY PUBLIC
DISTRICT OF COLUMBIA
MY COMMISSION
EXPIRES: JUNE 30, 1998

APPENDIX E — AFFIDAVIT OF LaFONDA SHELTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Crim. No. 90-00071-R

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JAMES EDWARD SMITH,

Defendant.

AFFIDAVIT

I, LaFonda Shelton, 7107 Shield Court, Upper Marlboro, Maryland, aver:

1. I am a daughter or James Smith.

2. I was present at my father's trial in March, 1991.

3. Except for a brief telephone conversation, I never spoke with my father's attorneys, even though I had been subpoenaed as a potential witness.

4. Prior to my father's arrest in February, 1988, I was aware that James R. Smith, "Skank," had an apartment on Fourth Street, S.E. I also knew he had an apartment in Maryland.

5. On the day my father was arrested in February, 1988,

Appendix E

Skank's brother Buck was in Washington, D.C. I knew that Buck had an apartment in Forestville, Maryland, and that he stayed with his brother, Skank, at Skank's apartment on Fourth Street, S.E., in Washington, D.C.

s/ LaFonda Shelton
LaFONDA SHELTON

SUBSCRIBED AND SWORN TO before me on this 19th day of Sept., 1994.

s/ Michael L. Phillips
NOTARY PUBLIC

My Commission Expires: MICHAEL PHILLIPS
NOTARY PUBLIC
DISTRICT OF COLUMBIA
MY COMMISSION
EXPIRES: JUNE 30, 1998

APPENDIX F — AFFIDAVIT OF JAMES SMITH

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Crim. No. 90-00071-R

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JAMES EDWARD SMITH,

Defendant.

AFFIDAVIT

I, James Smith, do hereby aver the following:

1. I am the defendant in the above-referenced case.

2. Prior to my trial in March, 1991, I told my lawyers that Bernard Jones, whose name was on the lease at Fourth Street, S.E., Washington, D.C., would testify that that was his apartment. Mr. Bernard Jones appeared at my trial, but my attorneys would not call him as a witness.

s/ James Edward Smith
JAMES EDWARD SMITH

SUBSCRIBED AND SWORN TO before me on this 19th day of September, 1994.

Appendix F

s/ illegible
NOTARY PUBLIC

My Commission Expires: 3/31/96

APPENDIX G — AFFIDAVIT OF OLIVIA BRATTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Crim. No. 90-00071-R

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JAMES EDWARD SMITH,

Defendant.

AFFIDAVIT

I, Olivia Bratton, 547 Wilson Bridge Drive, Oxon Hill, Maryland 20745, do hereby aver the following:

1. I am the daughter of the defendant James Smith. I was one of his co-defendants in his trial in March, 1991.

2. I was in close proximity to my father's attorney, Based on my observations, it appeared that he had been drinking before he came to court.

3. I overheard my father and Mr. Gettings having heated discussions right before the trial started. Mr. Gettings appeared very upset with my father because he refused to enter into a plea bargain with the government.

Appendix G

s/ Olivia Bratton
OLIVIA BRATTON

SUBSCRIBED AND SWORN TO before me on this 20 day of Sept, 1994.

s/ Michael L. Phillips
NOTARY PUBLIC

My Commission Expires: MICHAEL L PHILLIPS
NOTARY PUBLIC
DISTRICT OF COLUMBIA
MY COMMISSION
EXPIRES: JUNE 30, 1998

APPENDIX H — AFFIDAVIT OF BERNARD S. GRIMM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Crim. No. 90-00071-R

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JAMES EDWARD SMITH,

Defendant.

AFFIDAVIT

I, Bernard S. Grimm, hereby swear and affirm the following:

1. I was retained by the family of James Smith to investigate and prepare Mr. Smith's case for trial in the above-styled action. As part of the inveatigation, myself and an investigator, David A. Georger, identified two potential exculpatory witnesses for Mr. Smith — Mr. Bernard Jones and Mr. James Green.

2. Mr. Jones was located in a suburb of Richmond, Virginia. Mr. Jones would testify that the apartment located at Fourth Street was leased to him, not to Mr. Smith. Mr. Jones was subpoenaed for trial in the above-captioned case.

3. Mr. James Green of 1315 Oakland Road, Henrico County, Virginia, was likewise subpoenaed for trial. Defendant

Appendix H

James Smith believed Mr. Green could provide some exculpatory testimony regarding a weapon that Mr. Smith was charged with.

I HEREBY THAT THE ABOVE STATEMENTS ARE TRUE.

_____

BERNARD S. GRIMM

Subscribed and sworn to before me this __ day of September, 1994 at Washington, D.C.

_____

NOTARY PUBLIC

APPENDIX I — AFFIDAVIT OF DAVID A. GEORGER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Crim. No. 90-00071-R

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JAMES EDWARD SMITH,

Defendant.

AFFIDAVIT

I, David A. Georger, hereby swear and affirm the following:

1. I was hired by Bernard S. Grimm, Esq. to investigate *United States v. James E. Smith.* As part of that investigation, defendant James Smith identified two potential witnesses, Bernard Jones and James Green, that he believed would provide exculpatory testimony for him at trial.

2. Mr. Jones was personally served with a subpoena prior to the trial date. I am unaware whether he was called as a witness or not.

3. I made numerous trips to Mr. Green's residence on Oakland Road in Henrico County. I ultimately left a subpoena for him and he contacted Mr. Grimm acknowledging receipt.

Appendix I

4. Also as part of the investigative assignment for Mr. Smith, I listened to a least 50 wiretapped conversations between Mr. Smith and other defendants. I recopied and qued the portions of the tapes that I believed favorable to Mr. Smith, and made these tapes available to Mr. Dunham and Mr. Gettings for trial. I am unaware whether they sought to admit them into evidence.

I HEREBY THAT THE ABOVE STATEMENTS ARE TRUE.

_____
DAVID A. GEORGER

Subscribed and sworn to before me this __ day of September, 1994 at Washington, D.C.

_____
NOTARY PUBLIC